IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

No. 82-576

ROBERT F. PIERCE and URSULA S. PIERCE, Appellants

v.

DONALD M. REHNER, JR. and DOVER WOHNHEIGEN INC., a Delaware corporation, Appellees

ON APPEAL FROM THE SUPREME COURT OF DELAWARE

MOTION TO DISMISS OR AFFIRM AND BRIEF IN SUPPORT THEREOF.

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IN THE

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ROBERT F. PIERCE and URSULA S. PIERCE, Appellants

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ON APPEAL FROM THE SUPREME COURT

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MOTION TO DISMISS OR AFFIRM AND BRIEF IN SUPPORT THEREOF.

May It Please The Court:

The Appellee moves the Court, pursuant to Supreme Court Rule 16, to dismiss the appeal herein or, in the alternative, to affirm the judgment of the Supreme Court of Delaware entered on July 9, 1982, on the ground that the question on which the decision depends does not present a substantial Federal question.

OPINION BELOW

The opinion of the Supreme Court of Delaware is reported at 447 A.2d 1189 and set forth in the Appellants' Appendix at p. 1a.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Fourteenth Amendement to the Constitution of the United States:

> "...; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

This case also involves Delaware's "Automobile Guest Statute"[1], codified at 21 Del.C. §6101, which reads in pertinent part:

> "(a) No person transported by the owner or operator of a motor vehicle, boat, airplane or other vehicle as his guest without payment for such transportation shall have a cause of action for damages against such owner or operator for injury,

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1. Throughout this brief the statute will be referred to as the "Automobile" guest statute. The formal title is "Injury to nonpaying guest; exceptions as to passengers of public carriers and prospective purchasers of vehicles." 21 Del. C. §6101

death or loss, in case of accident, unless such accident was intentional on the part of such owner or operator or was caused by his wilful or wanton disregard of the rights of others."

QUESTION PRESENTED

Whether 21 Del.C. §6101 violates the due process and Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States?

STATEMENT OF THE CASE

This action stems from an automobile accident occurring on February 16, 1978, at the intersection of LaPores Private Drive and North State Street Extended (Business Route 13), Dover, Delaware.

Robert Pierce is a pharmaceutical salesman for American Cyanamid Company. He was in Dover to do an information call on the day of the accident. He stopped in at a local tavern at about 10:30 or 11:00 p.m. While at the tavern, he saw Donald Bierer. Mr. Pierce shared a pitcher of beer with Donald Bierer and one of Donald's working associates. At approximately one o'clock the party left the tavern to go to a local restaurant for breakfast. While in the parking lot, Donald Bierer offered to drive Robert Pierce to the restaurant and then back to his car.

From this point on, Robert Pierce remembers nothing. He remembers getting into Donald Bierer's car and he remembers awakening in the Emergency Room at Kent General Hospital. He has

spoken with Donald Bierer since the accident, and Donald informed him that in attempting to stop the car at a stop sign, the brakes did not hold on the ice and their car skidded onto North State Street Extended, where they were hit by a truck. Having known Bierer for ten years, Pierce had seen Donald drunk before and knows how he behaves when drunk. However, Bierer did not appear to be drunk at any time while they were together on the night of February 16, 1978. Robert Pierce consented to ride in the car provided for Mr. Bierer's use by Dover Volkswagen and driven by Mr. Bierer. However, at the time of this accident, Donald Bierer, Jr. was not driving the automobile involved as an agent, servant or employee of Dover Volkswagen.

Based on those facts, the Appellants filed a Complaint on February 12, 1980, alleging that the Appellee Bierer caused the accident by his negligence and/or wanton and willful misconduct.

On February 3, 1981, the Appellees, moved

for summary judgment on the basis, inter alia, of Delaware's Automobile Guest Statute, 21 Del.C. §6101. The plaintiff agreed that he could not substantiate the requirement of wanton and willful negligence. Therefore, he attacked the constitutionality of the Guest Statute. The argument was rejected by the Court below because of the Delaware Supreme Court's decision in Justice v. Gatchell, Del. Supr., 325 A.2d 97 (1974)[2] and, on October 29, 1981, the Superior Court of the state of Delaware granted the defendants' motion for summary judgment.[3]

An appeal was perfected to the Delaware Supreme Court which affirmed the lower Court under the rationale of Justice v. Gatchell.[4] This appeal followed.

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2 Appellants' Appendix, p. 17a
3 Appellants' Appendix, p. 9a
4 Appellants' Appendix, p. 1a

ARGUMENT

THE APPEAL SHOULD BE DISMISSED OR SUMMARILY AFFIRMED BECAUSE IT FAILS TO PRESENT A SUBSTANTIAL FEDERAL QUESTION.

A. THE APPELLANTS HAVE ASSUMED A HEAVY BURDEN IN SEEKING TO HAVE LEGISLATION ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF DELAWARE DECLARED UNCONSTITUTIONAL.

The police power of the State of Delaware i vested in its General Assembly which, within constitutional limits, is the sole judge as to when and how the police power of Delaware is to be exer cised for the protection and welfare of Delawarean A proper legislative determination as to the necessary exercise of that police power and the method to be employed is conclusive upon the court Silver v. Silver, 143 A. 240, affirmed 280 U.S. 117 (1929); Clendaniel v. Conrad, Del. Supr., 83 A. 1036, error dismissed 235 U.S. 712 (1929). In Ferguson v. Skrupa, 372 U.S. 726, 730 (1963), the court stated the general rule that courts may not substitute their social and economic belief for the judgment of the legislature:

> "We have returned to the original constitutional proposition that courts

> do not substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws. As this court stated in a unanimous opinion in 1941, 'We are not concerned ... with the wisdom, need, or appropriateness of the legislation.' Legislative bodies have broad scope to experiment with economic problems, and this court does not sit to 'subject the state to an intolerable supervision hostile to the basic principles of our governmental and wholly beyond the protection which the general clause of the Fourteenth Amendment was intended to secure.' It is now settled that States have power to legislate against what are found to be injurious practices in their internal commercial and business affairs... " (footnotes omitted)

Likewise, the court in Schweiker v. Wilson, 450 U.S. 221, 234 (1981), stated that even on the justification of the Equal Protection Clause, the court may not "substitute [its] personal notions of good public policy for those of Congress."

The Equal Protection Clause directs that "all persons similarly circumstanced shall be treated alike." F.S. Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920). But, so too, "The Constitution does not require things which are different in fact or opinion to be treated in law as though they were the same." Tigner v. Texas,

310 U.S. 141, 147 (1940). The initial discretion to determine what is "different" and what is "the same" resides in the legislatures of the States:

> "A legislature must have substantial latitude to establish classifications that roughly approximate the nature of the problem perceived, that accomodate competing concerns, both public and private, and that account for limitations on the practical ability of the State to remedy every ill. In applying the Equal Protection Clause to most forms of state action, we thus seek only the assurance that the classification at issue bears some fair relationship to a legitimate public purpose." Plyler v. Doe, 102 S. Ct. 2382, 2394 (1982)

In Williamson v. Lee Optical Co. of Oklahom 348 U.S. 483, 489 (1955), this Court, with respect to equal protection, said:

> "The problem of legislative classification is a perennial one, admitting of no doctrinaire definition. Evils in the same field may be of different dimensions and proportions, requiring different remedies. Or so the Legislature may think."

The reason for such judicial self-restraint is found in Vance v. Bradley, 440 U.S. 93, 97 (1979), wherein the court noted that unless there is cause to infer antipathy, the Constitution presumes that judicial intervention is unwarranted

because unwise laws will be rectified by the democratic processes:

> "The Constitution presumes, that absent some reason to infer antipathy, even improvident decisions will eventually be rectified by the democratic processes and that judicial intervention is generally unwarranted no matter how unwisely we may think a political branch has acted. Thus, we will not overturn such a statute unless the varying treatment of different groups or persons is so unrelated to the achievement of any combination of legitimate purposes that we can only conclude that the legislature's actions were irrational...and thus that the section is valid if it is 'rationally related to furthering a legitimate state interest.'" (emphasis added)

Thus, courts may not delegate to themselves legislative power and authority to determine statutes unconstitutional by "modern" standards under "present day" conditions in an over-zealous effort to effect perceived long-overdue reform. Keasling v. Thompson, Iowa Supr., 217 N.W.2d 687 (1974). See also "Judicial Nullification of Guest Statutes", 40 S.Cal.L.Rev. 884 (1968). Nor is it necessary that the Court agree that the statute is a wise, sound and appropriate public policy. McGowan v. Maryland, 366 U.S. 420 (1961).

The primary function and responsibility of Delawar General Assembly is, in its wisdom, tc weigh and determine the desirability of legislation affecting the social, economic and political policy of the State. "Misguided laws may nonetheless be constitutional." James v. Strange, 407 U.S. 128 (1972).

In challenging Delaware's automobile guest statute, the appellants have assumed a heavy burden. Hodel v. Indiana, 452 U.S. 314 (1981). Every legislative act is presumed constitutional, and any question of its validity must be resolved in favor of the statute, especially where the alleged discrimination is not based on race, color, religion, ancestry or financial position. Id; Allied Stores of Ohio v. Bowers, 358 U.S. 522 (1959).

The creation of distinct classification of persons is not denied the legislature by the Equal Protection Clause and a scheme of classification is permissible if any state of facts can be conceived reasonably to sustain it. Clements v. Fashing, 102 S.Ct. 2836 (1982);

Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, rehearing denied, 450 U.S. 1027 (1981); U.S. Railroad Retirement Board v. Fritz, 449 U.S. 166, rehearing denied, 450 U.S. 960 (1980).

In short, it is settled that a statute must be held valid if it is possible for the court to do so; every presumption must be resolved in favor of the statute's validity; and the court must not be concerned with the wisdom of the object the General Assembly of the State of Delaware sought to accomplish. Clements v. Fashing, supra; Schweiker v. Wilson, supra; Hodel v. Indiana, supra.

Equally applicable here is the court's admonition in Clements v. Fashing, supra, that this court is not authorized to review the manner in which a State has decided to govern itself, nor the wisdom of its legislative provisions:

> "Neither the Equal Protection Clause nor the First Amendment authorizes this court to review in cases such as this the manner in which a State has decided to govern itself. Constitutional limitations arise only if the classification scheme is invidious or if the challenged provision significantly impairs interests

protected by the First Amendment. Our view of the wisdom of a state constitutional provision may not color our task of constitutional adjudication." 102 S.Ct. at 2848.

B. THIS COURT CAREFULLY CONSIDERED THE CONSTITUTIONALITY OF AN AUTOMOBILE GUEST STATUTE IN SILVER V. SILVER AND UPHELD ITS CONSTITUTIONALITY, SPECIFICALLY REJECTING THE CONTENTION THAT THE STATUTE DENIED EQUAL PROTECTION RIGHTS; THUS STARE DECISIS APPLIES AND THE COURT NEED NOT CONSIDER THE STATUTE'S CONSTITUTIONALITY IN THIS ACTION.

Appellants ask this court to reconsider its previous decision upholding the constitutionality of the automobile guest statute. In 1929, this court was called upon to rule on the constitutionality of Connecticut's guest statute. Silver v. Silver, 280 U.S. 117 (1929). In that case, the court carefully considered the constitutionality of the automobile guest statute and upheld its constitutionality, specifically rejecting the contention that the statute denied equal protection rights. For this court to take the position now that the guest statute violates the Equal Protection Clause would be to ignore past decisions and to reject the principle of stare decisis. For, in the absence of a clear indication that a law applied earlier in history is wrong, a rule of law long acquiesced in and relied upon in commercial and business

practice should not be overthrown except for compelling reasons of public policy or imperative demands of justice. United States v. Maine, 420 U.S. 515 (1975).

The court in Hudgens v. N.L.R.B., 424 U.S. 507, on remand, 531 F.2d 1342 (5th Cir. 1976) noted the duty of the court as follows:

> "Our institutional duty is to follow until changed the law as it now is, not as some members of the court might wish it to be." 424 U.S. at 518.

The doctrine of stare decisis imposes a severe burden on the litigant who asks the court to disavow one of its precedents. For that doctrine not only plays an important role in orderly adjudication, it also serves the broader societal interests in even-handed, consistent, and predictable application of legal rules. Thomas v. Washington Gas Light Co., 448 U.S. 261 (1980), affirmed on rehearing, 649 F.2d 275 (5th Cir. 1981).

The court in Moragne v. States Marine Lines Inc., 398 U.S. 375, 403 (1970) listed some of the "weighty considerations" which underlie the principle that courts should not lightly overrule past decisions:

> "Very weighty considerations underlie the principle that courts should not lightly overrule past decisions. Among these are the desirability that the law furnish a clear guide for the conduct of individuals, to enable them to plan their affairs with assurance against untoward surprise, the importance of furthering fair and expeditious adjudication by eliminating the need to relitigate every relevant proposition in every case; and the necessity of maintaining public faith in the judiciary as a source of impersonal and reasoned judgments. The reasons for rejecting any established rule must always be weighed against these factors."

The United States Supreme Court has refused to reconsider its early holding that a Connecticut guest statute, similar to Delaware's, did not violate the Equal Protection Clause. Several times in the past decade, the court has been asked to consider whether a state or federal court had correctly determined that a guest statute did not violate the Equal Protection Clause. On each occasion, the court declined to grant plenary consideration of the question. Silver v. Silver, supra, was re-affirmed by the United States Supreme Court in the case captioned Sidle v. Majors, 536 F.2d 1156 (7th Cir.), cert. denied, 429 U.S. 945 (1976). Sidle involved

a challenge to the Indiana guest statute based upon equal protection grounds. Upon certification to the Indiana Supreme Court from the United States Circuit Court of Appeals, 7th circuit, the state court ruled that the statute is not violative of the Indiana Constitution. In denying the petition for certiorari in Sidle, t Supreme Court reached the merits by summary disposition.

In White v. Hughes, Ark. Supr., 519 S.W. 2d 70, appeal dismissed, 423 U.S. 805 (1975) and Cannon v. Oviatt, Utah Supr., 520 P.2d 883, appeal dismissed, 419 U.S. 810 (1974) and Hill v. Garner, 277 Or. 641, 561 P.2d 1016, appeal dismissed 434 U.S. 989 (1977), the issue was presente by means of appeal. The court nevertheless dismissed the appeals in those three instances for want of a substantial federal question, thus ruling on the merits of the equal protection issue Hicks v. Miranda, 422 U.S. 332 (1975).[5]

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5 As recently as 1980, the court has ruled on an analogous issue by dismissing the appeal from Bailey v. Pennington, Del. Supr., 406 A.2d 44 (1979), appeal dismissed, 444 U.S. 1061 (1980), on the issue of the constitutionality of Delaware's premises guest statute

The appellants would relegate the Silver opinion to the status of outmoded law because it does not meet today's equal protection classification based upon the standard of rationality as set forth in Schweiker v. Wilson, supra. It is our view that these cases, along with numerous decisions of other state supreme courts, clearly refute the appellants' contentions. Beasley v. Bozeman, Ala. Supr., 315 So.2d 570 (1975); Huydts v. Dixon, Colo. Supr., 606 P.2d 1303 (1980); Justice v. Gatchell, Del. Supr., 325 A.2d 97 (1974); Bickford v. Nolen, 240 Ga. 255, 240 S.E. 2d 24 (1977); Delany v. Bedame, 49 Ill.2d 168, 274 N.E.2d 353 (1971); Brady v. Acs, Ind. Supr., 342 N.E.2d 837 (1976); Keasling v. Thompson, supra; Botsch v. Reisdorff,193 Neb. 165, 226 N.W. 2d 121 (1975); Duerst v. Limbocker, Or. Supr., 525 P.2d 99 (1974); Behrns v. Burke, S.D. Supr., 229 N.W.2d 86 (1975); Tisko v. Harrison, Tex. App., 500 S.W.2d 565 (1973).

For these reasons, this court should reject appellants' argument that the constitutionality of Delaware's automobile guest statute presents a substantial federal question.

C. THE SUPREME COURT OF DELAWARE APPLIED THE PROPER EQUAL PROTECTION STANDARD OF REVIEW

Appellants on this appeal urge the court to declare Delaware's automobile guest statute an unconstitutional denial of the equal protection of the laws as guaranteed by the Fourteenth Amendment to the United States Constitution. They urge such a result because of an alleged change in the statement and application of the rational basis test as advanced in Schweiker v. Wilson, supra, and Clements v. Fashing, supra. In fact, the rational basis test has not changed since the days of Silver v. Silver, supra, and the Supreme Court of Delaware, in upholding the validity of the guest statute on the basis of Silver and Justice v. Gatchell, supra, applied the proper equal protection standard of review.

In advocating the position that the traditional rational basis test was not set forth correctly in Silver v. Silver, supra, and Justice v. Gatchell, supra, but was stated correctly in Schweiker v. Wilson, supra, and

Clements v. Fashing, supra, the appellants fail to take into account the fact that the court has employed numerous formulations for the rational basis test because the members of the court continue to hold divergent views on the clarity with which a legislative purpose must appear and about the degree of deference afforded the legislature in suiting the means to the ends. Schweiker v. Wilson, supra; U.S. Railroad Retirement Board v. Fritz, supra. Justice Powell, in his concurring opinion in Logan v. Zimmerman Brush Co., 102 S.Ct. 1148, 1162 (1982), stated that consistency of language in the equal protection cases is an ideal unlikely to be achieved:

> "It is necessary for this court to decide cases during almost every term on due process and equal protection grounds. Our opinions in these areas often are criticized, with justice, as lacking consistency and clarity. Because these issues arise in varied settings, and opinions are written by each of nine Justices, consistency of language is an ideal unlikely to be achieved."

That the enunciation of the rational basis test in Schweiker v. Wilson, supra, is no more correct than that of Silver v. Silver,

supra, is apparent after a reading of one of the latest decisions in that area: Clements v. Fashin supra. That court held that a statute would be ruled unconstitutional on equal protection grounds only if no grounds could be conceived to justify the State's goals in enacting the legislation:

> "The Equal Protection Clause allows the State considerable leeway to enact legislation that may appear to affect similarly situated people differently. Legislatures are ordinarily assumed to have acted constitutionally. Under traditional equal protection principles, distinctions need only be drawn in such a manner as to bear some rational relationship to a legitimate state end. Classifications are set aside only if they are based solely on reasons totally unrelated to the pursuit of the State's goals and only if no grounds can be conceived to justify them....We have departed from traditional equal protection principles only when the challenged statute places burdens upon 'suspect classes' of persons or on a constitutional right that is deemed to be 'fundamental.'" (emphasis added) 102 S.Ct at 2843.

Employing the same standard when the constitutionality of a Minnesota statute banning plastic nonreturnable milk jugs was challenged, the court in Minnesota v. Clover Leaf Creamery

Co., supra, noted that the State had identified four reasons why the classification between plastic and nonplastic nonreturnables was related to the statutory purpose and that as long as "any one of the four substantiates the State's claim, we must reverse the Minnesota Supreme Court and sustain the Act." 450 U.S. at 724.

The court went further to state that although parties challenging legislation under the Equal Protection Clause may introduce evidence supporting their claim that it is irrational, "they cannot prevail so long as 'it is evident from all the considerations presented [to the legislature], and those of which we may take judicial notice, that the question is at least debatable.'..." Id.

Finally, in Fritz, supra, the court noted that while the equal protection cases are neither uniform nor consistent, the court was "obliged to apply the equal protection component of the Fifth Amendment as we believe the Constitution requires." The court went further to state that when social or economic considerations are involved, the proper application of the equal

protection test is set forth in Dandridge v. Willi
infra, Jefferson v. Hackney, 406 U.S. 535 (1972)
and the case under consideration:

> "But like our predecessors and our successors, we are obliged to apply the equal protection component of the Fifth Amendment as we believe the Constitution requires and in so doing we have no hesitation in asserting, contrary to the dissent, that where social or economic regulations are involved Dandridge v. Williams, 397 U.S. 471, 90 S.Ct. 1153, 25 L.Ed.2d 491 (1970), and Jefferson v. Hackney, 406 U.S. 535, 92 S.Ct. 1724, 32 L.Ed.2d 285 (1972), together with this case, state the proper application of the test. The comments in the dissenting opinion about the proper cases for which to look for the correct statement of the equal protection rational basis standard, and about which cases limit earlier cases, are just that: comments in a dissenting opinion." U.S. Railroad Retirement Board v. Fritz, 101 S.Ct. 460, n.10.

The Fritz court likewise recognized that t
court had not in earlier cases been altogether consistent in its pronouncements in the equal protection area. The court noted that in recent years, it had consistently refused to invalidate on equal protection grounds legislation which it simply deemed unwise or unartfully drawn, citi
from Dandridge v. Williams, 397 U.S. 471, 485 (1970):

"In the area of economic and social welfare, a State does not violate the Equal Protection Clause merely because the classifications made by its law are imperfect. If the classification has some 'reasonable basis,' it does not offend the Constitution simply because the classification 'is not made with mathematical nicety or because in practice it results in some inequality.' ...'The problems of government are practical ones and may justify, if they do not require, rough accomodations--illogical it may be, and unscientific.'...'A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it.'

'[The rational basis standard] is true to the principle that the Fourteenth Amendment gives the federal courts no power to impose upon the States their views of what constitutes wise economic or social policy.'..."

In Justice v. Gatchell, supra, the Delaware Supreme Court applied the rational basis test, taking into account the different enunciations of the standard:

"Applying these tests: We are not persuaded that the evidence of unconstitutionality of the guest statute is 'clear and convincing'; or that the appellants have succeeded in overcoming the presumption of constitutionality and validity; or that no state of facts may reasonably be conceived to justify the statutory classification under present-day conditions." 325 A.2d at 102.

In Pierce v. Bierer, Del. Supr., 447 A.2d 1189 (1982), the Supreme Court of Delaware found that nothing had developed since Justice v. Gatchell, supra, to change the rationale adopte and conclusions reached in that case. Implicitly, then, the court has been presented with no evidenc to show that the legislative facts on which the nonpaying guest classification is apparently based could not reasonably be conceived to be true by the legislators.

As such, in light of the latest string of pronouncements of the rational basis test, it becomes apparent that there has been no actual change in the application of the rational basis test. As such, the court's reliance on Justice v. Gatchell is justified. In practice, if the classification has some "reasonable basis," it does not offend the Constitution simply because the classification is not made with mathematical nicety or because in practice it results in some inequality. The Supreme Court has said that it will not invalidate on equal protection grounds legislation that it simply deems unwise or unartfully drawn. U.S.

Railroad Retirement Board v. Fritz, supra.

Where there are plausible reasons for the legislature's action, the court's inquiry is at an end. U.S. Railroad Retirement Board v. Fritz, supra. It is, of course, "constitutionally irrelevant whether this reasoning in fact underlay the legislative decision" because the United States Supreme Court has never insisted that a legislative body articulate its reasons for enacting a statute. Flemming v. Nestor, 363 U.S. 603, 612, 80 S.Ct. 1367, 1373, 4 L.Ed.2d 1435 (1960). "This is particularly true where the legislature must necessarily engage in a process of line drawing....[A]nd the fact the line might have been drawn differently at some points is a matter for legislative, rather than judicial, consideration." U.S. Railroad Retirement Board v. Fritz, supra, 101 S.Ct. at 461. Thus, the equal protection obligation imposed by the Due Process Clause of the Fifth Amendment is not an obligation to provide the best governance possible. Schweiker v. Wilson, 450 U.S. 221, 101 S.Ct. 1074 (1981). This is a necessary

result of different institutional competences, and its reasons are obvious. Unless a statute employs a classification that is inherently invidious or that impinges on fundamental rights, areas in which the judiciary then has a duty to intervene in the democratic process, this court exercises only a very limited review power over the legislature, the appropriate representative body through which the public makes democratic choices among alternative solutions to social and economic problems. At the minimum level, this court consistently has required that legislation classify the persons it affects in a manner rationally related to legitimate governmental objectives.

Thus, then, under the latest case law, the pertinent inquiry is still whether the classification employed advances legitimate legislative goals in a rational fashion, the cases citing for support Dandridge v. Williams, supra. The rational basis standard, though does not allow the court to substitute its personal notions of good public policy for those of the legislature and in fact, "a statutory

discrimination will not be set aside if any state of facts reasonably may be conceived to justify it." Id. at 397 U.S. 501. Accord, Aetna Casualty and Surety Co. v. Smith, Del. Supr., 131 A.2d 168 (1957).

The United States Supreme Court has also said: "This inquiry employs a relatively relaxed standard reflecting the court's awareness that the drawing of lines that create distinctions is peculiarly a legislative task and an unavoidable one. Perfection in making the necessary classifications is neither possible, nor necessary. Schweiker v. Wilson, supra, 101 S.Ct. at 1083, citing Massachusetts Board of Retirement v. Murgia, 427 U.S. 307, 314. As long as the classificatory scheme rationally advances a reasonable and identifiable governmental objective, the court must disregard the existence of other methods of allocation which it, as individuals, perhaps would have preferred. Id.

The courts are limited under constitutional mandate to limit the legislature to its lawful territory of prohibiting legislation which, although enacted under the claim of a

valid exercise of the police power, is unreasonable and oppressive. Nevertheless, the court must recognize that the legislature is vested with a wide latitude of discretion in determining public policy:

> "But we reiterate that 'it is up to legislatures, not courts, to decide on the wisdom and utility of legislation,'..." Minnesota v. Clover Leaf Creamery Co., supra. at 726.

Therefore, every statute is clothed with the presumption of constitutionality and such presumption continues until clearly overcome by a showing to the contrary. Id. States are not required to convince the courts of the correctness of their legislative judgments. "Rather, those challenging the legislative judgment must convince the court that the legislative facts on which the classification is apparently based could not reasonably be conceived to be true by the governmental decisionmaker," Id, at 724, so that if the Delaware General Assembly could rationally have decided that the guest statute would increase hospitality or decrease the number of collusive

suits brought, or the issue is clearly debatable, the validity of the guest statute must be upheld. Id. So, if it is possible for the court to construe the guest statute that it will meet the test of constitutionality, it not only may, but should and must do so.

D. THE CONCEPT OF HOST PROTECTION IS A RATIONAL JUSTIFICATION FOR THE GUEST STATUTE

The Delaware Automobile Guest Statute, 21 Del.C. §6106, provides in pertinent part as follows:

> (a) No person transported by the owner or operator of a motor vehicle, boat, airplane or other vehicle as his guest without payment for such transportation shall have a cause of action for damages against such owner or operator for injury, death or loss, in case of accident, unless such accident was intentional on the part of such owner or operator or was caused by his wilful or wanton disregard of the rights of others."

Our automobile guest statute precludes a nonpaying guest passenger from recovering damages for personal injuries sustained by the ordinary negligence of the owner or operator. Recovery for wanton or willful negligence is allowed. Because clearly two classifications of passengers are made--guests and paying passengers--and because each class may be treated differently in identical situations, the inequity is patent. The issues are whether or not the classification is reasonable and bears

a fair and substantial relationship to the legitimate purpose of the statute. The presumptions are that it is and does, and the burden is upon the appellants to show the contrary.

In determining if our statute bears a fair and substantial relationship to the purpose for which it was enacted, its purpose must first be ascertained. The purposes traditionally attributed to automobile guest rules and statutes have been the fostering of hospitality by insulating generous hosts from lawsuits instituted by injured guests and the elimination of collusive lawsuits.

The legislature could and did act reasonably by differentiating between standards of care owed on the basis of compensation paid and in so doing, did not present a question of invidious discrimination. The Delaware statute does not distinguish between automobile guests and all other guests, but operates equally for guests in boats, airplanes, motor vehicles and other vehicles. Furthermore, this classification of an invited guest made in the automobile guest

statute extends throughout other areas of Delaware law. Because there is the same standard with regard to the duty owed by the Delaware landowner to his business invitees and to his licensee and the duty owed to a bailor by a gratuitous bailee or a bailee for hire, the automobile guest in this jurisdiction is not placed in a distinct classification where he alone as a recipient of generosity is deprived of the duty of due care by his host. Since the distinction between the duties owed to social guests and business invitees, and by gratuitous bailees and bailees for hire is thus recognized in other contexts, the question is whether it is irrational when considered in relation to the purpose of the guest statute. It is not an irrational, but rather, a very rational distinction because it provides the test for determining whether hospitality has been extended by the host to his guest. Bickford v. Nolen, supra; Duerst v. Kimbocker; supra; Tisko v. Harrison, supra.

Such argument as advanced by the appellants was refuted in Silver v. Silver, supra, and it

was held that the legislature is not held rigidly to a choice of regulating all or none, but that it is sufficient if it strikes at an evil where it most frequently occurs. In Silver, the principle contention was that the Connecticut guest statute made an unreasonable distinction between a guest in an automobile and a guest in any other mode of transportation or in any other place, thus depriving him of the equal protection of the law. Rejecting this contention, the Connecticut Supreme Court recognized the automobile as a proper basis for the legislative classification in that it had a fair and substantial relation to the legislative object of control and regulation of traffic on public highways.

The court held that the legislature acted well within the limits of police power in making a distinction between the degree of care to be exercised by the owner or operator of a motor vehicle toward a guest and that to be exercised toward one who pays for transportation. The court stated that such a distinction ran through many fields of law and thus, the court saw inherent

justice in the rule that one who undertakes to perform a duty gratuitously should not be under the same measure of obligation as one who enters upon the same undertaking for pay.

On appeal to the United States Supreme Court, the judgment was affirmed. Writing for a unanimous court, Mr. Justice Stone observed that whether there had been a serious increase in the evils of vexatious litigation in automobile guest cases was for the legislature to determine, and that the wisdom of the legislation restricting liability in such cases is not the concern of courts.

In response to the argument that no grounds existed for a distinction between gratuitous passengers in automobiles and those in other classes of vehicles, the court said:

> "In this day of almost universal highway transportation by motorcar, we cannot say that abuses originating in the multiplicity of suits growing out of the gratuitous carriage of passengers in automobiles do not present so conspicuous an example of what the legislature may regard as an evil, as to justify legislation aimed at it, even though some abuses may not be hit. ...It is enough that the present statute strikes at the evil where

it is felt and reaches the class where it most frequently occurs." 280 U.S. at 123-124.

Equally as true in Delaware as in Connecticut, the use of the motor vehicle upon the public highways has been validly subjected to legislative regulation. The presence of the guest in this area would itself create a basis for a distinct classification from other guests located where there was no overwhelming public interest. The motor vehicle exerts a dominate influence in contemporary society and its use creates many economic and social problems. In Delaware, where a significant portion of our economic resources are devoted to the construction and maintenance of highways, and where the economic burden bears a direct relationship to the number of vehicles and the total cumulative mileage on the highways each year, it would be ludicrous to suggest that the guest statute is not rationally based when it promotes the conservation of petroleum and other natural resources consumed in highway travel and encourages hospitality, which directly affects the

number of vehicles present on the highways, thus avoiding traffic congestion and wear to the surfaces of the roadway. Botsch v. Reisdorff, supra; Cannon v. Oviatt, supra.

Furthermore, while it can be argued that wide-spread insurance coverage has negated the hospitality rationale, this does not take into account that the guest's claim need not be limited to the host's liability insurance coverage or that a host who find himself liable in a tort action risks the possibility of a cancellation of his insurance or a substantial increase in his premiums or that a host may be uninsured. Bickford v. Nolen, supra; Botsch v. Reisdorff, supra; Duerst v. Limbocker, supra. In Delaware, statutorily required policy limits are relatively low. See 21 Del.C. §2118(a). Moreover, the fact that a significant number of drivers do not have any liability insurance is evident by the No Fault Act which requires uninsured motorist coverage to be offered in automobile liability insurance policies. Botsch v. Reisdorff, supra.

In addition, the presence of liability insurance goes only to the need for protection from ungrateful guests. In fact, liability insurance is similarly a policy decision. The suggestion that the burden of the injured guest should be borne by the motoring public through liability insurance is an economic and social solution that is subject to legislative determination. The policy question of who should bear the loss (guest or rest of motoring public) is properly to be decided by the legislature. The No Fault Act provides a compromise, the guest receiving limited compensation for injuries, while hospitality is encourgaged by not exposing the host to unlimited liability and staggering insurance rates. Cannon v. Oviatt, supra. The appellants' suggested simplistic solution that the motoring public should bear the costs of the injured guests ignores the economic consequence that increased claims will be reflected in increased insurance rates, creating an economic hardship not only on the generous host, but on the driving public

and thus, chilling hospitality:

> "...Liability insurance is widely prevalent today. In few cases will the [elimination of the guest statute] shift the burden of loss from the injured guest to the negligent host personally. In the great majority of cases it will shift part or all of the burden of loss from the injured individual to the motoring public. ..." (emphasis supplied) McConville v. State Farm Mutual Automobile Ins. Co., Wis. Supr., 113 N.W.2d 14, 19 (1962).

Also present is the inherent assumption that the indignation normally felt by a host for a guest's ingratitude does not arise where the host suffers no monetary loss because his insurer is sued. Botsch v. Reisdorff, supra; Duerst v. Limbocker, supra. Notwithstanding that there may be no direct financial loss arising from it, a lawsuit is not an experience which endears the guest to the host. As the court in Chaplowe v. Powsner, Conn. Supr., 175 A. 470 (1934) stated:

> "As the use of automobiles became almost universal, the proverbial ingratitude of the dog that bites the hand that feeds him, found a counter part in the many cases that arose, where generous drivers, having offered rides to guests, later found themselves defendants in cases that often

> turned upon close questions of negligence. Undoubtedly, the Legislature, in adopting this act, reflected a certain natural feeling as to the injustice of such a situation."

It is prerogative of the legislature to use prescriptive legislation to foster or perpetrate standards of moral or ethical conduct generally accepted as a part of the mores of the community so long as they do not involve invidious categories or fundamental interests. In order to declare the guest statute unconstitutional, the court must be prepared to say that none of the herein articulated reasons would support greater hospitality and that the court, rather than the legislature, can better discern the community standard of morality. This is plainly presumptuous and contrary to the court's often pronounced pledge of judicial self-restraint. Although these reasons may not be absolute, they are strongly persuasive and they do satisfy the test of equal protection. The classifications of guest passenger and paying passenger bear a fair and substantial relation to a valid purpose of the guest statute.

Any final determination of values should be left to the legislature.

E. THE OBJECTIVE OF PREVENTIVE COLLUSIVE LITIGATION IS A RATIONAL JUSTIFICATION FOR THE GUEST STATUTE.

It is the appellants' contention that the distinction between passengers who pay for their ride and those who ride gratuitously cannot be justified by the recognized state policies underlying the Delaware Guest Statute, 21 Del.C. §6101. The appellants argue that the protection of hospitality cannot support these distinctions because the prevalence of liability insurance renders such considerations irrelevant. However, another primary purpose of the statute is the prevention of fraud on liability insurers. If automobile liability insurance is now more nearly universal than it was when the statute was enacted, the potentiality for collusion between owners and/or drivers and guest is even greater now than it was then.[6] It is reasonable to assume that an injured guest and an agreeable

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6 It should be noted that over half of the states which have upheld the constitutionality of the automobile guest statute have enacted a scheme of no-fault insurance: Arkansas, Colorado, Delaware, Georgia, Oregon, South Dakota, Texas and Utah.

host may be anxious to see compensation paid so long as the host does not have to pay it. They could even conspire against an insurer so that the truth will not known. Here again we must defer to legislative judgment. That the rule may also bar some claims is not a sufficient ground to hold the guest passenger classification as violative of the Equal Protection Clause.

This court should not accept the appellant condemnation of the guest statute as an impermissibly overinclusive classification scheme. The appellants argue that in broadly prohibiting all automobile guests from instituting actions for negligence because a small segment of that class may file collusive suits, the statute burdens a wider range of individuals than are included in the class of those tainted with the mischief at which the law is aimed. The appellants contend that instead of confining the disability to those who actually institute collusive suits, the statute reaches out beyond such persons and burdens the great number of honest automobile guests. The effect

of that position seems to be that legislation denying recovery for ordinary negligence must be limited to guest claims shown to be actually collusive. No allowance is made for the difficulty of detecting collusion between an insured owner or operator and his guest or for the even greater difficulty of establishing it to the satisfaction of a jury. Of course, legislation limited to litigation in which collusion can be proved would be superfluous because such proof in itself would be sufficient in most cases to defeat an action based on ordinary negligence. The purpose of the statute is to prevent collusion that is not so easily exposed. Tisko v. Harrison, supra. Since no method is available to identify collusive guest suits, the legislature cannot possibly draw a statute so narrowly and precisely as to apply only to cases of actual collusion.

In order to deal with the problem at all, the legislature must weigh the advantage of barring fraudulent guest claims against the disadvantage of also barring honest guest claims.

This balancing of intangibles is a proper legislative function. An analogous problem is dealt with in the Statute of Frauds, which assumes that the advantages of barring fraudulent claims on certain classes of oral contracts outweigh the disadvantages of barring honest claims on such contracts. Likewise, Delaware disallows suits by a wife against her husband or her husband's employer, one of the reasons being to promote the public policy of prevention of fraud upon insurance companies. Fields v. Synthetic Ropes, Inc., Del. Super., 211 A.2d 617 (1965). As such, the guest statute does not create a distinct classification for automobile guests as compared to others insofar as collusive lawsuits are concerned, but rather indicates that the legislature has taken strong measures to protect society from the fraudulent few. The wisdom of that sort of decision is exactly what makes this a legislative, rather than a judicial decision. As the court in Sidle v. Major, supra at 770, 771, noted:

> "We think it no constitutional infirmity that a statute may not operate to perfection, if it may

> reasonably be expected to operate effectively. We do not agree with the California Court that the classifications are so over-inclusive as to defy notions of fairness or reasonableness. ... We acknowledge an 'overbreadth' in our guest statute, in that those with bona fide damage claims are caught in the same net with the would-be collusive and fraudulent. However, we perceive no reasonable alternative. There is no way, short of full-blown litigation--the very evil the act is designed to avert--that the bona fides of the plaintiff's claim could be determined."

The notion of impermissible over-inclusiveness has been held to have no place in the equal protection analysis of social and economic regulations not affecting freedoms guaranteed by the Bill of Rights. In Dandridge v. Williams, supra, it is stated as follows:

> "For this court to approve the invalidation of state economical or social regulation as 'overreaching' would be far too reminiscent of an era when the court thought the Fourteenth Amendment gave it power to strike down state laws 'because they may be unwise, improvident, or out of harmony with particular school thought,' ... That era long ago passed into history. ..."

It is mere speculation to say that few guests act collusively. Furthermore,

there is no responsible data available, or the plaintiff has supplied us with none, on whether the majority of automobile guests are honest or not. As the court stated in Tisko v. Harrison, Tex. App., 500 S.W.2d 565, 572 (1973), "we have no reliable information concerning the extent of the evil which prompted enactment of the statute," nor do we have reliable information that the evil originally seen by the legislature no longer exists.

As in other areas, including the various classes of cases in which separate burdens of proof are judicially required, it is a reasonably conceived ground for the legislature to determine that the temptation or actual incidence of fraud is very great; or that collusion is expecially difficult to detect; or that the judicial system should not be responsible for having to detect fraud. A legislature or a court is reasonably justified in believing that the alternative of requiring a higher degree of proof in automobile guest cases, for example requiring a standard of clear and

conclusive evidence instead of a preponderance of the evidence, is a definite factor in controlling the problem of collusive lawsuits and losses. There is little difference between an acknowledged power by judicial decision or legislation to invoke a higher degree of proof of a higher degree of negligence.

More recent decisions agree that an underinclusive classification is not necessarily a fatal defect unless the legislation involves a suspect classification or a fundamental interest. Only in those areas is a legislative classification subject to strict scrutiny. Tisko v. Harrison, supra. The underinclusive argument--that the legislation excludes some who should be included--has been discredited by the United States Supreme Court in other circumstances on numerous occasions. In Railway Express Agency v. New York, 336 U.S. 106, 110 (1949), it was held that a city regulation which prohibits advertising trucks on the city streets, but which permits the owner of a business to advertise his own wares on his own trucks was not

a violation of equal protection. In noting that all evils of the same kind need not be cured, the court stated:

> "And the fact that New York City sees fit to eliminate from traffic this kind of distraction but does not touch what may be even greater ones in a different category, such as the vivid displays on Times Square, is immaterial. It is no requirement of equal protection that all evils of the same genus be eradicated or none at all."

In a separate concurring opinion, Justice Jackson said:

> "It is rather because there is a real difference between doing in self interest and doing for hire, so that it is one thing to tolerate action from those who act on their own and it is another thing to permit the same action to be promoted for a price.
>
> "Certainly the presence or absence of hire has been the hook by which much highway regulation has been supported. Rights usual to passengers may be denied to the nonpaying guest in an automobile to limit vexatious litigation. Silver v. Silver, supra, 336 U.S. at 115, 69 S.Ct. at 468, 93 L.Ed. at 541."

In Williamson v. Lee Optical Co. of Oklahoma, 348 U.S. 483, 489 (1955), the court emphasized that the law need not be consistent

with its aims in every respect, but that it is enough if the legislature saw the law as the rational way to correct a particular evil:

> "The problem of legislative classification is a perennial one, admitting of no doctrinaire definition. Evils in the same field may be of different dimensions and proportions, requiring different remedies. Or so the legislature may think. ... Or the reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind. ...The legislature may select one phase of one field and apply a remedy there, neglecting the others. ...The prohibition of the Equal Protection Clause goes no further than the invidious discrimination."

When courts intervene to take such basic decisions from the legislative body whose right and duty it is to make them, they delegate to themselves power which is not theirs and authority which resides in the legislature. In other words, the fact that a statute includes more persons or fewer within its sweep than those who fit the pattern which the statute was designed to catch does not invalidate a law. Even if a classification involved here is to some extent both underinclusive and overinclusive and thus, the line drawn by the

General Assembly imperfect, it is nonetheless the rule that in a case like this, "perfection is by no means required." Vance v. Bradley, supra at 108. This involves a balancing of competing advantages and disadvantages, a legislative function. Whether the cure is worse than the disease is not within the court's province to decide.

Equal Protection analysis allows the courts to question only whether the removal of negligence protection for the guest might protect the host from ingratitude or might encourage free transportation or might prevent fraud on insurer and collusive lawsuits. Whether in fact the guest statute promotes hospitality between driver and guest and collusive lawsuits is not the question: the Equal Protection Clause is satisfied by the court's conclusion that the Delaware Legislature could rationally have decided that its ban on lawsuits by nonpaying guests in the absence of wanton or willful negligence might foster greater hospitality or fewer collusive

lawsuits. What constitutional examination requires is whether the classification bears a reasonable relation to the statutory purpose--whether the class encompasses those persons who must be affected to produce the desired result and whether the statute will reasonably tend to produce the desired result. Behrns v. Burke, supra.

It is not sufficient to argue that some drivers do not rely on the guest statute's protection when they offer free rides nor to argue that there are other ways to prevent collusive lawsuits because the Equal Protection Clause does not require that classifications be drawn with scientific or mathematical precision nor that the statutory classifications cure all evils. All it requires in this context is that the difference in treatment is not arbitrary and unreasonable.

In determining that the classification is reasonably related to its stated objectives,

it is not for this court to decide whether the policies behind the guest statute are wise or necessary and the court need not pass judgment on those matters. Rather, the inquiry should be limited solely to whether the statute violates the constitutional principles stated herein. As the United States Supreme Court stated:

> "We do not inquire whether this statute is wise or desirable, or 'whether it is based on assumptions scientifically substantiated.' Misguided laws may nonetheless be constitutional." James v. Strange, 407 U.S. 128, 133, 92 S.Ct. 2027, 2031, 32 L.Ed.2d 600 (1972).

Whether social and economic conditions have changed to such an extent that a guest statute is no longer useful or desirable is a decision that should be made by the legislature, not the courts. When courts take it upon themselves to make such policy judgments, they infringe upon the power rightly belonging to the legislature which has the right and the duty to make such decisions. Justice v. Gatchell, supra, Keasling v. Thompson, supra, Stoehr v. Whipple, 405 F.Supp. 1249 (D.Neb. 1976); Tisko

v. Harrison, supra.

Finally, after Silver, and until Brown v. Merlo, Cal. Supr., 506 P.2d 561 (1968), there was essentially quiet in the land on the issue of the constitutionality of automobile guest statutes. Merlo admittedly has created the furor. Some states upon reconsideration have declared their automobile guest statutes unconstitutional, while others have observed constancy. Notwithstanding the result in any given case across this nation, it is clear that the issue is being reviewed as a matter of social and economic policy in the state courts and state legislatures. That is as it should be; the issue should be resolved in the States, not in the United States Supreme Court.

The States constitute 50 experimental laboratories and this court said in Dandridge v. Williams, supra, that those 50 laboratories are free to experiment and are given great latitute in the realm of social, economic and political values.

The Delaware Supreme Court has upheld

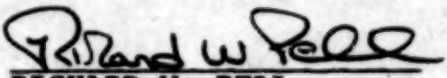
the constitutionality of Delaware's Premise Guest Statute, which is not present before this court, as well as the constitutionality of the Delaware Automobile Guest Statute. The guest statute, applied uniformly and fairly for 49 years in Delaware has not been modified or amended. It involves an issue of public policy which is well-founded and should be upheld until such time as the legislative branch sees fit to change it. This is as it should be in the United States.

Accordingly, the constitutionality of the guest statute should be upheld and the decision of the court below affirmed.

CONCLUSION

This appeal should be dismissed or the decision below affirmed because the question on which the decision depends does not present a substantial Federal question.

Respectfully submitted,



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PROOF OF SERVICE

AND NOW, TO-WIT, this 1st day of November A.D. 1982, I hereby certify that all parties required to be served have been served copies of Appellee's Motion to Dismiss or Affirm for Want of a Substantial Federal Question, and the accompanying brief in support of the motion, that service has been made on Appellant pursuant to Rule 28.3 by personal service, by delivery of three copies thereof on November 1, 1982, to Appellants' counsel of record: Joseph M. Bernstein, Suite 820, Market Tower, 9th & Market Streets, Wilmington, Delaware 19801.

TYBOUT, REDFEARN,
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BY: RICHARD W. PELL
Attorney for
the Appellees

STATE OF DELAWARE)
) ss.
NEW CASTLE COUNTY)

BE IT REMEMBERED that on this 1st day of November 1982, personally appeared before the undersigned, a Notary Public in and for the State and County aforesaid, the deponent, who being by me duly sworn according to law, deposes and says that he is the attorney for Donald W. Bierer, Jr., and Dover Volkswagen, Inc., and is employed in the offices of Tybout, Redfearn, Casarino & Pell, 1110 Bank of Delaware Building, 300 Delaware Avenue, Wilmington, Delaware, and on November 1, 1982, he deposited in the mailbox at 300 Delaware Avenue, Wilmington, Delaware, the attached paper addressed to:

Supreme Court of the United States
1st and Maryland Avenue, N.E.
Washington, D.C. 20543

Donald W. Pell

SWORN TO AND SUBSCRIBED before me the day and year aforesaid.

Margaret Ellingwood
NOTARY PUBLIC